Supreme Court, U.S.
FILED
931362 FEB 28 1994
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

JESSE VACA ESTRADA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

13 pp

QUESTION PRESENTED

Whether the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, empowered Congress to enact 18 U.S.C. 922(q) (Supp. IV 1992), which makes it a federal offense to possess a firearm within 1000 feet of a school.

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v.

JESSE VACA ESTRADA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is unpublished, but the judgment is noted at 8 F.3d 23 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1993. The court of appeals denied a timely petition for rehearing on December 1, 1993. App., *infra*, 3a-4a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. The provisions of 18 U.S.C. 921(a)(25), 921(a)(26), and 922(q) (Supp. IV 1992) are reprinted in the Appendix, *infra*, 5a-7a.

STATEMENT

1. At about 2:00 a.m. on September 23, 1992, San Antonio police observed petitioner and another individual jump over a fence onto the grounds of J.T. Brackenridge Elementary School. The officers spoke to the two intruders briefly, but petitioner and the other individual fled when a second patrol car arrived. As petitioner fled, he turned, drew a concealed handgun, and fired the gun. A few minutes later, petitioner was apprehended with the gun. Feb. 26, 1993, Tr. 14-16.

2. Petitioner entered a conditional guilty plea to a charge of discharging a firearm in a school zone with reckless disregard for the safety of another. Feb. 26, 1993, Tr. 19. The district court sentenced petitioner to 46 months' imprisonment, to be followed by one year of supervised release, and ordered him to pay a fine of $200. Apr. 27, 1993, Tr. 13.

3. The court of appeals reversed in a brief per curiam opinion. App., *infra*, 1a-2a. The court explained that the "sole issue presented upon this appeal is whether [petitioner] was validly convicted of violating 18 U.S.C. § 922(q)." *Id.* at 1a. The court

noted that its recent decision in *United States* v. *Lopez*, 2 F.3d 1342 (1993), petition for cert. pending, (No. 93-1260) had reversed a conviction under Section 922(q) where the government did not allege a connection to interstate commerce in the indictment. App., *infra*, 2a. Because the indictment in this case did not allege any specific connection between petitioner's conduct and interstate commerce, the court overturned petitioner's conviction. *Ibid.*

REASONS FOR GRANTING THE PETITION

The decision in this case relies entirely on the Fifth Circuit's earlier decision in *Lopez*. We have filed a petition for a writ of certiorari seeking review of the *Lopez* decision, which currently is pending as No. 93-1260. As we explain in that petition, the decision in *Lopez* conflicts with a recent decision of the Ninth Circuit, which expressly rejected the analysis articulated by the Fifth Circuit in *Lopez*. See *Lopez* Pet. 6 (discussing *United States* v. *Edwards*, 13 F.3d 291 (9th Cir. 1993)).*

If the Court grants our petition in *Lopez* and reverses the judgment of the Fifth Circuit in that case, reversal would be appropriate in this case as well. Accordingly, the Court should hold the petition in this case pending disposition of *Lopez*.

* We have provided counsel for respondent a copy of our petition in *Lopez*.

CONCLUSION

The petition for a writ of certiorari should be held pending disposition of *United States* v. *Lopez*, No. 93-1260, and disposed of as appropriate in light of the Court's disposition of that case.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FEBRUARY 1994

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8298
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESSE VACA ESTRADA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. SA-92-CR-367

[Filed Oct. 28, 1993]

Before: POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.
PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

The sole issue presented upon this appeal is whether appellant Estrada was validly convicted of violating 18 U.S.C. § 922(q), the "Gun-Free School Zones Act." Estrada was convicted on his conditional plea of guilty of discharging a firearm in a school zone with reckless disregard for the safety of another. The indictment did not allege any connection to interstate commerce.

This Court recently reversed a conviction under § 922(q) of possessing a firearm in a school zone and directed that the indictment be dismissed, on grounds that the "indictment did not allege *any* connection to interstate commerce." *United States v. Lopez*, 2 F.3d 1342 (5th Cir. Sept. 15, 1993, No. 92-5641), 1993 WL 355468 at *18. Accordingly, Estrada's conviction must be reversed and the cause remanded with directions to dismiss the indictment.

REVERSED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8298

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESSE VACA ESTRADA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. SA-92-CR-367

[Filed Dec. 1, 1993]

ON PETITION FOR REHEARING

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

FOR THE COURT:

/s/ Henry A. Politz
HENRY A. POLITZ
Chief Judge

APPENDIX C

18 U.S.C. (Supp. IV 1992):

§ 921. Definitions

(a) As used in this chapter—

* * * * *

(25) The term "school zone" means—

(A) in, or on the grounds of, a public, parochial or private school; or

(B) within a distance of 1,000 feet from the grounds of a public, parochial or private school.

(26) The term "school" means a school which provides elementary or secondary education, as determined under State law.

* * * * *

§ 922. Unlawful acts

* * * * *

(q)(1)(A) It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(B) Subparagraph (A) shall not apply to the possession of a firearm—

(i) on private property not part of school grounds;

(ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political

subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtain such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;

(iii) which is—

(I) not loaded; and

(II) in a locked container, or a locked firearms rack which is on a motor vehicle;

(iv) by an individual for use in a program approved by a school in the school zone;

(v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;

(vi) by a law enforcement officer acting in his or her official capacity; or

(vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

(2)(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm at a place that the person knows is a school zone.

(B) Subparagraph (A) shall not apply to the discharge of a firearm—

(i) on private property not part of school grounds;

(ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;

(iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or

(iv) by a law enforcement officer acting in his or her official capacity.

(3) Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun-free school zones as provided in this subsection.

* * * * *

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In the

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

JESSE VACA ESTRADA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

LUCIEN B. CAMPBELL
Federal Public Defender

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Attorney of Record for Respondent

QUESTION PRESENTED FOR REVIEW

Whether a conviction under the Gun-Free School Zones Act can be sustained where the Act does not require a nexus with commerce.

No. 93-1362

In the

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

JESSE VACA ESTRADA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

REASONS FOR DENYING THE PETITION

THIS CASE DOES NOT PRESENT A QUESTION MERITING REVIEW BY CERTIORARI.

Relying on its decision in *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), *petition for cert. filed*, 62 USLW 3555 (Feb. 2, 1994), the Fifth Circuit reversed Jesse Vaca Estrada's conviction under the Gun-Free School Zones Act. The Government seeks review of the decision reversing Estrada's conviction. The Government's petition simply states that its petition in *Lopez* sets forth the reasons why certiorari should be granted, and that this case should be held pending the disposition in *Lopez*. Pet. at 3. As explained in the response to the United States' petition in *Lopez*, the Fifth Circuit's decision was correct and does not present an issue or circuit conflict that merits review by this Court.[1] Respondent Estrada incorporates by reference the response in *Lopez* and prays that the Court deny the Government's petition.

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1. Counsel for Respondent Estrada is also counsel for Respondent Lopez in No. 93-1260. As explained in his April 4, 1994, letter to the Court, counsel agrees that the petition in this case should be held pending the *Lopez* disposition.

CONCLUSION

FOR THESE REASONS, the petition for writ of certiorari should be denied.

Respectfully submitted.

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April 12, 1994

RECEIVED
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SUPREME COURT, U.S.

Mr. William K. Suter
Clerk, Supreme Court
of the United States
1 First Street, NE
Washington, D.C. 20543

Attn: Mr. Frank Lorson

Re: **United States of America**
v.
Jesse Vaca Estrada

Dear Mr. Suter:

By a letter dated April 4, 1994, Respondent Estrada informed the Court that, unless instructed otherwise, his response to the Government's petition was to adopt the response filed by Respondent Lopez in *United States v. Alfonso Lopez, Jr.*, No. 93-1260. This afternoon we were advised by Mr. Lorson that the Court wished us to file a Motion for Leave to Proceed in Forma Pauperis and a brief response in opposition to the Government's petition. Mr. Lorson advised me that the response could incorporate by reference the response in *Lopez*. In accordance with my conversation with Mr. Lorson, I have enclosed for filing an original and eleven copies of Respondent's Brief in Opposition and Motion for Leave to Proceed in Forma Pauperis in the above-referenced cause.

By copy of this letter, we are mailing two copies of the response to the Honorable Drew S. Days, III, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; and a copy to Richard L. Durbin, Jr., Assistant United States Attorney, Western District of Texas, 601 N.W. Loop 410, Suite 600, San Antonio, Texas 78216.

Thank you for your attention to this matter.

Very truly yours,

LUCIEN B. CAMPBELL
Federal Public Defender

for Philip Pyzel

JOHN R. CARTER
Assistant Federal Public Defender

Attorney of Record for Respondent

Enclosure
cc: Honorable Drew S. Days, III
Mr. Richard L. Durbin, Jr.
Mr. Jesse Vaca Estrada

No. 93-1362

In the Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

JESSE VACA ESTRADA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

The undersigned, an attorney, a member of the Bar of this Court, certifies that pursuant to Rule 29.3, Supreme Court Rules, he served the within Motion for Leave to Proceed In Forma Pauperis and Brief in Opposition on the Counsel for Petitioner by enclosing a copy of each in an envelope, with first-class postage prepaid, addressed to counsel of record at his post office address:

The Honorable Drew S. Days, III
Solicitor General of the United States
U.S. Department of Justice
Washington, D.C. 20530
(202) 514-2201

and depositing same in a United States mailbox at San Antonio, Texas, on April 12, 1994; and further certifies that all parties required to be served have been served.

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